IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

FRIDAY, THE 14TH DECEMBER 2007 / 23RD AGRAHAYANA 1929

OP.No. 3502 of 2003(P)

PETITIONER:

M/S. ARGUS INTERNATIONAL,
II FLOOR, SUJATHA CENTRE, NO.4, SHESHADRI ROAD,
ALWARPET, CHENNAI-18, REPRESENTED BY ITS PARTNER,
S.S.SUNDAR.

BY ADV. SRI.V.P.SUKUMAR
SRI.BEJOY CHERIYAN

RESPONDENTS:

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1. THE ASSISTANT COMMISSIONER (ASSESSMENT),
SPECIAL CIRCLE-I, ERNAKULAM.

2. THE DEPUTY COMMISSIONER (APPEALS),
COMMERCIAL TAXES, ERNAKULAM.

3. M/S. MULLAR & PHIPPS (INDIA) LTD.,
QUEEN'S MANSION, AMRIT KESHAV NAIK MARG,
MUMBAI-1.

R1 & R2 BY GOVERNMENT PLEADER, SRI.P.RAVINDRA BABU
R3 BY SMT.S.K.DEVI
SRI.M.RAJ MOHAN
SRI.SANTHOSH P.ABRAHAM
SRI.FRANKUR D.JAYAN
SRI.DEEPSUR D.JAYAN
SRI.K.P.PRADEEP (PAYYANNUR)
SRI.SHANMUGHAM D. JAYAN
SMT.P.K.MAYA DEVI

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 14/12/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.NO.3502/2003

ORDER ON C.M.P.NO.6202/2003

DISMISSED

14.12.2007 SD/- C.N.RAMACHANDRAN NAIR, JUDGE.

APPENDIX

PETITIONER'S EXTS.

EXT.P1: COPY OF THE AGREEMENT DT.12.12.86 ENTERED INTO BETWEEN THE PETITIONER AND THE 3RD RESPONDENT COMPANY.

EXT.P2: COPY OF THE AGREEMENT DT.11.5.1987 ENTERED INTO BETWEEN THE PETITIONER AND THE 3RD RESPONDENT COMPANY.

EXT.P3: COPY OF THE AGREEMENT DT.26.9.1988 ENTERED INTO BETWEEN THE PETITIONER AND THE 3RD RESPONDENT COMPANY.

EXT.P4: COPY OF ONE SUCH PURCHASE ORDER DT.5.8.1988 ISSUED BY THE 3RD RESPONDENT TOT HE PETITIONER.

EXT.P5: COPY OF THE REPLY DATED 7.12.1989 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.

EXT.P6: COPY OF THE ASSESSMENT ORDER DT.20.12.1989 PASSED BY THE 1ST RESPONDENT FOR THE YEAR 88-89.

EXT.P7: COPY OF THE APPELLATE ORDER DT.27.2.1990 PASSED BY THE 2ND RESPONDENT FOR THE YEAR 88-89.

EXT.P8: COPY OF THE ORDER DT.18.11.1996 PASSED BY THE 1ST RESPONDENT FOR THE YEAR 88-89.

EXT.P9: COPY OF THE ASSESSMENT ORDER DT.18.11.1996 FOR 89-90 PASSED BY THE 1ST RESPONDENT.

EXT.P10: COPY OF THE COMMON APPELLATE ORDER DT.28.7.99 PASSED BY THE 2ND RESPONDENT FOR THE YEARS 88-89 & 89-90.

EXT.P11: COPY OF THE NOTICE DATED 22.7.2002 ISSUED TO THE PETITIONER BY THE 1ST RESPONDENT FOR 88-89.

EXT.P12: COPY OF THE NOTICE DATED 22.7.2002 ISSUED TO THE PETITIONER BY THE 1ST RESPONDENT FOR 89-90.

EXT.P13: COPY OF THE REPLY DATED 31.8.2002 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT FOR 88-89.

EXT.P14: COPY OF THE REPLY DATED 31.8.2002 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT FOR 89-90.

EXT.P15: COPY OF THE ASSESSMENT ORDER DT.31.8.2002 PASSED BY THE 1ST RESPONDENT FOR THE YEAR 88-89.

EXT.P16: COPY OF THE ASSESSMENT ORDER DT.31.8.2002 PASSED BY THE 1ST RESPONDENT FOR THE YEAR 89-90.

//True Copy //

PA to Judge.

C.N.RAMACHANDRAN NAIR, J.

O.P. No. 3502 of 2003

Dated, this the 14th day of December, 2007

J U D G M E N T

Petitioner is challenging Exts.P15 & P16 orders of assessment issued by the 1st respondent under Section 19B of the KGST Act. Petitioner is a manufacturer of 'Cuticura' brand of talcum powder for the brand name holder M/s.Mullar & Phipps (India) Limited, the 3rd respondent herein. Petitioner's factory is located at Madras wherefrom the product is stock transferred to Kerala and sold to the Brand name holder for marketing in the State. The 1st respondent found that as against normal margin of 15% in the nature of wholesale trade of the product, the Brand name holder resold the item after purchase from petitioner at a gross profit of 55.05%. The 1st respondent, therefore, rejected petitioner's sales consideration and made assessment under Section 19B of the KGST Act. The turn over adopted for first sale by petitioner is 85% of the sales turn over of the Brand name holder i.e. by providing a margin of 15% towards gross profit. In fact, the original assessment orders were subjected to appeals and the impugned orders are issued after remand by the appellate authority once.

2. I heard learned counsel for the petitioner and learned

Government Pleader.

3. In order to appreciate the contentions, the relevant section under which assessments are made has to be looked into. Therefore, Section 19B of the KGST Act is extracted hereunder.

> "19B. Assessment in case of undervaluation : –
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> (1) If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sale or purchase of any goods at prices lower than the prevailing market price of such goods, it may estimate the value of each goods, on the basis of the prevailing market price and assess or reassess the dealer to the best of its judgment, after making such enquiry as it may consider necessary and after affording the dealer a reasonable opportunity of being heard.
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> (2) The provision of sub-section(2) to (4) of Section 19 shall apply to the assessment or reassessment under sub-section (1)".

The contention of the petitioner is that Section 19B provides for assessment of actual sale proceeds received, and there is no justification to add another dealer's margin to the turn over of petitioner. Learned counsel for the petitioner relied on two Division Bench decisions of this Court, one of which is in **Deputy**

Commissioner of Sales Tax Vs. **Kerala Distilleries & Allied Products Pvt. Ltd.,** reported in 89 STC 58 and another in **C.O.Devassy** Vs. **State of Kerala,** reported in 81 STC 2. Learned Government Pleader has relied on the judgment in STRV No.227/03 dated 05/01/2004, wherein a Division Bench of this Court has held that in the case of tax evasion, the Assessing Officer will be entitled to make assessment under Section 19B, and submits that petitioner's case is clearly covered by the said decision. The first case, above referred, relied on by the petitioner pertains to manufacture and sale of product by a dealer in Kerala to the Brand name holder, which is also within Kerala. So far as second decision of this Court is concerned, it has nothing to do with the product with brand name. The case herein is one of a clear scheme of evasion of tax practised by the Brand name holder with the assistance of petitioner because petitioner, not being the Brand name holder, is not entitled to market the product anywhere in the country. The entire production is admittedly in the brand name of the Brand name holder, which alone is entitled to market the product, and so much so, in the normal course, product should have been sold and delivered by the petitioner at the factory itself to the Brand name

holder or at least consigned on interstate sale by the petitioner to the Brand name holder in Kerala for marketing the product in Kerala. This would have led to a case of first sale by the Brand name holder which leads to payment of tax on the actual turn over. On the other hand, petitioner helped the Brand name holder to evade tax on the product by transferring goods to Kerala and by making first sale within the State to the Brand name holder. In fact since goods manufactured by petitioner were for sale only to the Brand name holder, interstate movement of goods by petitioner to Kerala is under contract of sale and therefore sale though subsequently made is actually an interstate sale under Section 3(a) of CST Act, taxable in Tamil Nadu. Petitioner escaped CST Assessment in Tamil Nadu because Tamil Nadu sales tax authorities would not have seen the contract under which goods are manufactured and sold by petitioner. However, this is clearly a scheme of evasion of tax practised by petitioner and the Brand name holder. The Supreme Court has in two decisions in **Commissioner of Income Tax** Vs. **Sri.Meenakshi Mills Ltd. & Others** reported in 67 ITR 609 and **McDowell & Co. Limited** Vs. **Commercial Tax Officer** reported in 154 ITR 148 held that Courts

should not approve colourful devices or dubious methods adopted by parties for evading payment of tax legitimately due to the State. These decisions were considered by the Division Bench in the un reported decision above referred. In fact, I am of the view that this is a fit case for considering penalty on the petitioner as well as on the Brand name holder for attempting evasion of tax. However, on account of the officer's diligence, evasion has not taken because he made assessment by invoking Section 19B. In the circumstances, probably, the Assessing Officer did not consciously invoke penalty provisions against petitioner and the 3rd respondent. In view of the above findings, the impugned order is upheld and the original petition is dismissed as devoid of any merit.

(C.N.RAMACHANDRAN NAIR, JUDGE.)

jg